

*Before the  
Federal Communications Commission  
Washington, D.C. 20554*

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In the Matter of )  
)  
1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media )  
Applications, Rules and Processes )  
)

MM Docket No. 98-43

COMMENTS OF HARRY J. PAPPAS, STELLA A. PAPPAS, AND SKYCOM, INC.

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## SUMMARY

Harry J. Pappas and Stella A. Pappas (the “Pappases”) and Skycom, Inc. (“Skycom”) believe that the Commission is mistaken in its tentative conclusion that zoning delays can be overcome and the zoning process completed within a three-year period if a permittee pursues zoning approval diligently. The Pappases and Skycom have attempted to construct a new television station in Fond du Lac, Wisconsin for approximately ten years. Their efforts to do so have been consistently impeded by the actions of state and local authorities who have opposed the construction of the station’s proposed tower for a variety of reasons, all of which: (a) have been decided in favor of the Pappases and Skycom by federal regulatory bodies expert in such matters, (b) are not appropriate for consideration by such authorities, and/or (c) are not reasonable in relation to the federal interests in making broadcast service available to the public and in promoting competition in mass media services.

As a result, the Pappases and Skycom would not have been able to complete construction within the three-year construction period proposed by the Commission in this proceeding, and under the Commission’s tentative proposal not to consider difficulties in obtaining local zoning approval a circumstance sufficiently beyond the permittee’s control to warrant an extension, the construction permit would have expired.

Such a result would have been contrary to the public interest in that it would have deprived the public in the proposed station's service area of the possibility of receiving service from the proposed station in the near future.

## COMMENTS

### I. INTRODUCTION

Harry J. Pappas and Stella A. Pappas (collectively, the “Pappases”), holders of the permit issued by the Commission to construct commercial television station WMMF-TV, Channel 68, Fond du Lac, Wisconsin (File No. BPCT-870610KN, as modified), and Skycom, Inc. (“Skycom”), a Wisconsin corporation wholly owned by the Pappases, by counsel and pursuant to Section 1.415 of the Commission’s Rules, hereby respectfully submit their Comments in response to certain aspects of the Commission’s *Notice of Proposed Rulemaking* (the “NPRM”), MM Docket No. 98-43, released April 3, 1998.

In the NPRM, the Commission proposes to toll the period of a construction permit when circumstances outside a permittee’s control prevent construction. NPRM at ¶64. The Commission seeks comment on whether circumstances beyond a permittee’s control should include delays due to the failure to obtain local zoning authorizations, and presumably to secure other necessary state and local approvals. The Commission tentatively concludes that the three-year construction period it proposes in the NPRM will provide sufficient time to overcome zoning delays if the permittee pursues zoning approvals diligently. NPRM at ¶65.

## **II. THE THREE-YEAR CONSTRUCTION PERIOD PROPOSED BY THE COMMISSION IS NOT SUFFICIENT IN ALL CASES TO ENABLE PERMITTEES TO OBTAIN STATE AND LOCAL APPROVALS**

The Commission tentatively concludes that “zoning delays can be overcome and construction can be completed within the proposed three-year construction period if a permittee pursues the zoning process diligently”. NPRM at ¶65. The Pappases’ and Skycom’s experiences in attempting to obtain necessary state and local authorizations to construct the proposed tower (the “Tower”) for television station WMMF-TV on Channel 68 in Fond du Lac, Wisconsin (File No. BPCT-870610KN) disproves this conclusion. In order to give the Commission the flavor of the long and arduous path which the permittee’s attempts to obtain these approvals have taken, and to demonstrate to the Commission how much time, effort and resources (monetary and otherwise) can be required to secure state and local approvals in the face of unwarranted and obstinate opposition, the Pappases and Skycom have described their efforts below in some detail.<sup>1/</sup>

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<sup>1/</sup> For the reasons set forth in these Comments, the Pappases and Skycom support the Commission’s proposal to apply existing rules on extension of construction permits to permits that are beyond their initial construction periods. NPRM at ¶68. This proposal will assure that holders of construction permits such as the one for station WMMF-TV will have the opportunity to extend their permits where construction has not been completed due to the failure to obtain state and local approvals despite diligent pursuit of such approvals.

**A. Skycom's Experiences in Attempting to Obtain State Approval For Construction of WMMF-TV Tower**

In June, 1987, Skycom (then owned by John and Elizabeth Stebbins, who subsequently sold their interests in Skycom to the Pappases) applied to the Commission for a construction permit to build television station WMMF-TV.<sup>2/</sup> The grant of the construction permit was delayed due to opposition to the Tower by the Experimental Aircraft Association (the "EAA") and the Wisconsin Department of Transportation (the "WDOT"). That opposition was based upon air navigation safety concerns. Skycom has reason to believe, however, that the opposition actually derived from the fact that the EAA holds its annual pilots' "fly-in" in Oshkosh, Wisconsin, and that the presence of the Tower would require that EAA pilots attending the annual "fly-in" make some minor deviations in their flight patterns.

In an effort to minimize any potential adverse effects on air navigation, Skycom agreed to reduce the height of the Tower from a proposed 2,000 feet above ground level ("AGL") to 1,706 feet AGL. Nevertheless, the WDOT, in concert with the EAA, continued to oppose the Tower.

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<sup>2/</sup> In May, 1995, the construction permit was assigned to the Pappases pursuant to the Commission's consent granted in File No. BAPCT-941116KK. The Pappases also purchased all the stock of Skycom, which continues to hold certain state authorizations in connection with the Tower. For simplicity, the Pappases and Skycom will be referred to collectively as "Skycom".

In July, 1987, following a contested hearing in which the WDOT participated, the Federal Aeronautical Administration (the “FAA”) issued a Determination of No Hazard to Air Navigation (Aeronautical Study No. 86-AGL-954-OE) with respect to the Tower (the “No Hazard Determination”). The WDOT petitioned the FAA to reconsider the No Hazard Determination, but the FAA refused to do so. In July, 1989, on the basis of the No Hazard Determination, the Commission issued a construction permit to Skycom (the “Construction Permit”) to build television station WMMF-TV.

Meanwhile, Skycom was seeking a permit from of the WDOT’s Bureau of Aeronautics to construct the Tower, pursuant to Wisconsin Statutes section 114.35. Not surprisingly, the WDOT initially denied its approval in January, 1989. However, in a contested hearing on Skycom’s application, the hearing officer for the Wisconsin Commissioner of Transportation determined that the Tower would not have a significant adverse impact on air navigation and proposed issuance of the section 114.35 permit to Skycom. The Commissioner adopted the hearing officer’s determination, with minor changes. The WDOT unsuccessfully appealed to the Circuit Court and ultimately to the Wisconsin Court of Appeals to overturn the Commissioner’s determination. In December, 1991, the Wisconsin Court of Appeals issued its decision affirming the decision of the Commissioner, and in January, 1992, the Bureau of Aeronautics granted Skycom a section 114.35 construction permit



In January 1993, the EAA, the WDOT, and the Aircraft Owners and Pilots Association ("AOPA") attempted further to hinder Skycom by filing informal objections to Skycom's application for extension of the Construction Permit (File No. BMPCT-921222KF). The Commission staff denied the informal objections.

In July, 1997, AOPA again attempted to hinder construction of the Tower by filing a letter with the FAA requesting that the FAA void the No Hazard Determination and undertake a new aeronautical study with respect to the proposed Tower's impact on air navigation. Skycom considers this request to be groundless, inasmuch as the No Hazard Determination was issued after a thorough FAA study of all relevant factors and after a contested hearing. Skycom has filed a response with the FAA, objecting to AOPA's request and asking that it be denied.

Skycom believes that the EAA and AOPA, in combination with certain officials of the WDOT, have used the state administrative process in order to hinder and delay the construction of the Tower. In Skycom's opinion, these activities have not been based upon any genuine concern for air navigation safety, but by a desire on the part of certain private pilots to retain their preferred air routes during the EAA's annual Oshkosh fly-in. The continued efforts by the EAA, the WDOT and AOPA to oppose Skycom through inappropriate means -- such as opposition to Skycom's application to the Commission to

extend the Construction Permit, and AOPA's recent filing with the FAA requesting that the FAA re-open the No Hazard Determination -- give credence to Skycom's suspicions.

Regardless of the motivation of those opposing Skycom, it is abundantly clear that the Tower constitutes no significant danger to air navigation. The FAA issued its No Hazard Determination on the basis of a fully developed record. In addition, the Wisconsin Commissioner of Transportation also determined, following a contested hearing, that the Tower posed no significant air navigation hazard, and this determination was upheld by the courts. The Commission issued its Construction Permit to Skycom in July, 1989. Due to the determined opposition of the EAA and AOPA, Skycom was not able to secure the WDOT construction permit until 1992, and then only after expending considerable effort and resources in opposing the WDOT.

In fact, the costs of litigating against EAA, AOPA, and WDOT largely exhausted Mr. and Mrs. Stebbins' personal resources. Had the Pappases not elected to purchase the Stebbins' interests in the Construction Permit, it is probable that WMMF-TV would have been stillborn and the litigiousness of the parties opposing the Tower would have been vindicated, to the detriment of the public of Fond du Lac and environs. Even to this day, eleven years after the Stebbinses initiated their efforts to bring a new television service to

the community, Fond du Lac and its surrounding communities are still waiting for that television service.

**B. Skycom's Experiences in Attempting to Obtain Local Approvals For Construction of WMMF-TV Tower**

Construction of the Tower also has been impeded by the actions of municipal authorities. In December, 1994, Skycom filed a petition with the Town of Elba, Wisconsin to rezone the land on which the Tower is to be built. The Elba Plan Commission recommended that Skycom's petition be denied, and this recommendation was upheld by the Elba Town Board. In July, 1995, Skycom filed a writ of certiorari with the Circuit Court of Dodge County seeking review of the Town Board's decision. In April, 1996, the Circuit Court upheld the Town Board. Skycom appealed the Circuit Court's decision to the Wisconsin Court of Appeals. In September, 1997, the Court of appeals, in a per curiam decision, affirmed the Town Board's denial of the rezoning requested by Skycom.

In rejecting Skycom's petition for rezoning, the Town Board provided no reasons of its own for doing so, but merely relied on the report and recommendations of the Plan Commission. The Plan Commission appeared to base its recommendations on three principal criteria: (a) that the Tower would have a negative impact on air navigation, (b) that the Tower would have a negative impact on migratory birds, and (c) that the

programming which the Station would broadcast via the Tower would not be beneficial to the community.<sup>3/</sup> As Skycom has pointed out in its pleadings before the Circuit Court and the Court of Appeals, these assertions are unsupported by the facts or the record, and the Board has exceeded its authority in considering these criteria in making its determination.

More significantly for the Commission's purposes, however, each of these criteria involves an area which is not within the scope of legitimate local land-use concerns. The FAA issued the No Hazard Determination after making a full review of the record and a contested hearing. The Commission issued the Construction Permit after a determination that the construction of the Station would serve the public interest with respect to Fond du Lac, Wisconsin and the surrounding communities, which include Elba. In short, these issues have been fully considered and addressed by federal agencies that are specifically charged with statutory duties to regulate, and that possess considerable expertise in, the subject matters in question.<sup>4/</sup>

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3/ In one of its findings, the Plan Commission asserted that "[o]ne more television channel is not a benefit to the community; there are enough television channels now." Memorandum in support of Plaintiff's Dispositive Motions at 15 in Konkel, et. al., vs. Town of Elba Town Board, State of Wisconsin Circuit Court for Dodge County, Case No. 95-CV-337 (quoting Plan Commission's findings).

4/ The Plan Commission's consideration of whether another television channel is needed in the Town of Elba also raises First Amendment concerns regarding the extent to which government may regulate commercial speech. It is doubtful that the Plan Commission's conclusory findings in this regard would meet the appropriate Constitutional tests. In any event, neither this Commission -- nor, a  
(continued...)

As regards the Plan Commission's assertion that the Tower would pose a threat to migratory birds, in a letter to Skycom the United States Fish and Wildlife Service stated, in essence, that there would be no significant adverse impact to either migratory birds or endangered species of birds, provided that the Tower was marked in a manner similar to marking requirements already imposed with respect to the Tower by the FAA. In addition, a representative of the Wisconsin Department of Natural Resources (the "WDNR"), who appeared at the Plan Commission hearings, did not indicate that the Tower would be any more hazardous to birds than any other tall structure, and stated that the WDNR had no authority to prevent the construction of tall structures such as the Tower. As with air safety and the question of whether the community "needs" another television channel, the issue of the impact of broadcast towers on migratory wildlife is one that should not be addressed by local zoning authorities who lack the expertise to do so in an informed manner.

The Plan Commission also based its recommendation, in part, on its findings that the construction of the Tower would jeopardize the use of land for exclusively

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4/ (...continued)  
fortiori, a local municipal zoning authority -- can base a decision on a perception by government that there are "enough" speakers and that another speaker (e.g., a television station) would be superfluous. But even if such a conclusion were Constitutionally supportable, it would far exceed the Elba Town Board's legitimate interest in protecting the zoning plan of the community.

agricultural purposes and would constitute an “eyesore.” While the Town Board has a legitimate interest in maintaining the agricultural character of land, to the extent reasonably possible, the Board has acted unreasonably in this case. As Skycom has shown, only about one acre of land would be removed from agricultural use by construction of the Tower. This is much less than the amount of land lost to agricultural use by recent rezoning approvals of the Board. The Plan Commission’s findings that the Tower would constitute an eyesore are so vague and subjective that they are entitled to be given little, if any, weight. If municipalities are allowed to withhold their consent to the construction of broadcast facilities on such flimsy grounds as these, broadcasters will continue to confront enormous obstacles to siting such facilities and the long-anticipated “roll-out” of digital television service will be jeopardized. It is worth noting that agricultural areas are frequently the most logical places to site towers, due to the paucity of residents and the lower costs of land in such areas.

It is clear that the Plan Commission and the Town Board engaged in a conclusory fact-finding exercise in considering Skycom’s petition for rezoning. The grounds for denying the rezoning and land-use permit for the Tower cited by the Commission and Town Board are factually spurious or utterly beyond the legitimate jurisdictional concern and expertise of such authorities. The type of unwarranted obstruction posed by the Plan Commission and the Town Board of the Town of Elba has helped to delay Skycom’s

construction of the Tower for well over the three-year construction period proposed by the Commission.

### **III. ALLOWING EXTENSION OF A CONSTRUCTION PERMIT WHILE THE PERMITTEE IS DILIGENTLY PURSUING STATE AND LOCAL APPROVALS WILL SERVE THE PUBLIC INTEREST**

As the Commission notes, Section 319 of the Communications Act of 1934, as amended, and the Commission's rules governing construction permits are intended to strike a balance between the fundamental interest in expediting new service to the public and preventing the warehousing of scarce spectrum on the one hand, and the recognition that there are sometimes legitimate obstacles which prevent the rapid construction of broadcast facilities on the other. NPRM at ¶54. However, a rule which does not allow for the extension of a construction permit where construction has not been completed within three years due to delays in obtaining state and local approvals despite diligent efforts to do so, actually thwarts the goal of expediting new service to the public while failing to recognize the legitimate obstacles which may delay construction.

For example, as described in Section II above, Skycom diligently has taken all reasonable steps necessary to attempt to obtain required state and local approvals for the Tower. Along the way, it has accomplished much in this regard. After hard fought

battles, it has obtained WDOT (and FAA) approvals to construct the Tower. While Skycom has not yet obtained local zoning approval for the Tower, it has litigated the local zoning issues extensively and now intends to launch a public relations effort to garner support for a renewed effort by Skycom to have the property on which the Tower is to be located rezoned. Skycom believes that its efforts to overcome the Town Board's opposition to the Tower have helped to define the issues and will be a positive factor in gaining broad-based public support for its rezoning effort.

In short, while Skycom is not yet at the finish line, its dogged efforts have not been in vain. If the construction permit had expired three years after its grant, however, the only result would have been that the allotment for Channel 68 in Fond du Lac would have laid dormant until another party applied for a construction permit. Even if a permit was awarded to another party, there is no reason to believe that that party would have been any more successful in obtaining the necessary state and local approvals than Skycom has been. In fact, the new permittee may have lacked Skycom's resources and determination. At a minimum, the effort expended by Skycom up to the time its permit expired would have gone to waste and the new permittee would have had to begin the state and local approval process anew. Such a scenario could only result in even greater



delay in bringing television service on Channel 68 to the people of Fond du Lac and the surrounding communities.<sup>3/</sup>

Nor is there any reason to believe that a rule allowing for extension of a construction permit where the permittee has been diligently pursuing, but has been unable to obtain, state and local approvals would lead to warehousing of spectrum. By definition, warehousing involves hoarding spectrum without making efforts to construct the required broadcast facilities. If a permittee is required as a condition of the grant of any extension to make a showing that it continues diligently to pursue the state and local approval process, no warehousing of spectrum is possible.

The Commission recognizes that extensions of construction permits will be necessary where the permit itself is the subject of administrative or judicial appeal. NPRM at ¶59. However, an extension is no less appropriate because construction is delayed while necessary approvals make their way through the state and local

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<sup>3/</sup> While another permittee could theoretically construct its tower at a different site where local approval might be more readily obtained, such a solution has practical problems. Skycom has expended considerable effort in searching for an alternative site at which the Tower could be located and which would provide sufficient coverage to enable Station WMMF-TV to be operated profitably. However, Skycom has been unable to identify any available alternative site that is suitable from a technical, regulatory and economic perspective.

administrative and judicial process, frequently a more arduous exercise than the administrative and judicial process relating to the permit itself.

#### **IV. CONCLUSION**

Since 1987, Skycom has attempted to bring to Fond du Lac its first television broadcast service. Its efforts to do so, however, have been thwarted by well-organized opponents pursuing their own individual agendas and by state and local authorities which have exceeded their regulatory authority. By virtue of quasi-judicial and judicial authority, Skycom has been able to overcome opposition at the state level. However, due to the very high level of deference paid by the Wisconsin courts to local authorities on zoning issues, Skycom has not yet been able to overcome the local authorities' opposition. Such obstruction at the state and local levels is convincing evidence that state and local approvals cannot, in all cases, be obtained within the three-year construction period proposed by the Commission.

The public interest would be better served by allowing extension of construction permits where the permittee can demonstrate that its failure to construct is due to its inability to obtain necessary state or local approvals, despite its diligent efforts to do so. The Pappases and Skycom urge the Commission to preserve permittees' rights to obtain extensions of construction permits on this basis.

Respectfully submitted,

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**Certificate Of Service**

I, Alicia M. Altamirano, a secretary in the law firm of Paul, Hastings, Janofsky & Walker, LLP, hereby certify that true copies of the foregoing "COMMENTS OF HARRY J. PAPPAS, STELLA A. PAPPAS AND SKYCOM, INC." were sent this 16<sup>th</sup> day of June, 1998, by United States first-class mail, postage prepaid, to the following:

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